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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 46.[1]

GALVESTON CHAMBER OF COMMERCE AND HOUSTON PORT AND TRAFFIC BUREAU, *Appellants*,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

No. 47.[1]

RAILROAD COMMISSION OF TEXAS, *Appellant*,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY, ET AL.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

BRIEF OF APPELLANTS IN NOS. 46 AND 47.

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[1] Consolidated with No. 45, The Alabama Great Southern Railroad Company et al. v. The United States of America et al. and No. 48, Savannah Sugar Refining Corporation et al. v. The United States of America et al.

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CONSTITUTION AND STATUTES.

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OPINIONS BELOW.

The opinion of the three-judge District Court from which these appeals were taken is *Alabama Great Southern R. Co.* v. *United States*, 88 F. Supp. 982 (R. 173), the above named

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appellants having been intervening complainants in the case in the District Court.

The Court in that case sustained the order of the Interstate Commerce Commission entered in I. C. C. Docket No. 26712, entitled *Rail and Barge Joint Rates*, covered by an original and a supplemental report, 270 I. C. C. 591 and 274 I. C. C. 229, respectively. (R. 16, 75, 78.)

JURISDICTION.

The judgment of the District Court, which dismissed the above named appellants' intervening complaint, as well as all other complaints arising out of I. C. C. Docket No. 26712, was entered on January 12, 1950. (R. 173-190) The appeals here involved were filed and allowed on March 7, 1950. (R. 198-213) The jurisdiction of this Court rests on Title 28 U. S. C. § 1253 and 2101(b), 62 Stat. 928, 962. Motions to affirm the judgment and decree of the District Court were filed by some of the appellees. Appellants filed briefs in opposition. Probable jurisdiction was noted on May 15, 1950. (R. 460)

RELATED APPEALS.

These appeals have been consolidated with No. 45, *The Alabama Great Southern Railroad Company* v. *United States et al.* and No. 48, *Savannah Sugar Refining Corp.* v. *United States et al.*

STATUTES AND PROVISION OF CONSTITUTION INVOLVED.

The pertinent provisions of the Interstate Commerce Act, 49 U. S. C., and the Constitution are set out in Appendix No. 1 to this brief. They are also quoted in part in the body of the brief where that appears desirable.

THE RECORD.

There will be little need to refer to the record before the Commission. Therefore, under a stipulation among counsel for all the parties, that record was not printed, but is nevertheless part of the record on appeal. (R. 458) Where reference is herein made to particular parts of it, page and exhibit numbers will be prefixed by the initials "I. C. C."

QUESTIONS PRESENTED.

These questions relate particularly to the rail-barge rates between New Orleans, La., and points in the interior West as hereinafter described.

1. Whether the Commission has power to deprive Galveston and Houston, Texas, of their natural advantage of location by giving the competing port of New Orleans a system of rail-barge rates differentially lower than the corresponding rail rates when there is no showing of advantages in transportation conditions or the cost of performing the rail-barge service to justify differentials.

2. Whether the Commission can lawfully require rail-barge rates to be made lower than corresponding rail rates between the same points, when it finds that from a cost-of-service standpoint rail-barge transportation is not performed at any economy that would justify differentials.

3. Whether (if there is no valid finding as stated above) the Commission can lawfully require rail-barge rates to be made lower than corresponding rail rates between the same points unless the record positively shows that from a cost-of-service standpoint there is substantial economy in rail-barge transportation such as would justify differentials.

4. Whether inferiority of the rail-barge service, i.e., the lesser value of the service to the shipper, is a lawful ground for requiring differentials when the record affords no cost or other transportation justification for differentials.

5. Whether the Commission can lawfully require, as reasonable maxima, rail-barge rates made by deducting prescribed differentials from the corresponding rail rates between the same points, without finding, on appropriate evidence, that the rail rates themselves are up to a reasonable maximum level and that the rail-barge rates likewise would be up to such a level.

6. Whether the Commission, in the face of the anti-ports-preference clause of the Constitution, and in the absence of cost or other transportation justification for the differentials, can constitutionally require rail-barge rates for New Orleans, in the State of Louisiana, to be lower than the corresponding rail rates between the same points, when competing ports, such as Galveston and Houston, in another state, and served by rail only, have no such rail-barge rates.

7. Whether the Commission can lawfully prescribe differential rail-barge rates according to a formula which takes into account only the rail portion of the through haul; i.e., disregarding the barge portion of the haul.

8. Whether the Commission's order undertaking to require differential rail-barge rates is vitiated by errors of law, arbitrary action, lack of substantial evidence, lack of quasi-jurisdictional findings and/or lack of a rational basis?

THE PARTIES TO THIS BRIEF.

Galveston Chamber of Commerce is a voluntary non-profit organization representing the business interests of Galveston, Texas, especially as a port. One of its primary functions is to protect the city against unlawful freight rates, including preferential rates accorded competing ports, such as New Orleans.

Houston Port and Traffic Bureau is a non-profit organization, the constituents of which are local interests concerned with the protection and welfare of Houston, Texas, as a port. Fifty percent of its budget is supplied by the

Harris County Houston Ship Canal and Navigation District, a political sub-division of the State of Texas. Its functions are similar in all essential respects to those of the traffic department of a chamber of commerce, such as that at Galveston.

The Railroad Commission of Texas is a body duly established by the Constitution and Statutes of the State of Texas to investigate and prescribe rates, fares and charges for intrastate application within that State for common carriers operating therein, and is charged with the added duty of representing the State of Texas and the interests of its people in proceedings involving interstate rates.

The above-named concerns were parties at interest in the case before the Interstate Commerce Commission and the case before the District Court out of which the present action arose. They will be hereinafter referred to as the Texas interests.

These parties align themselves with the railroads, appellants in No. 45, but present some additional issues.

STATEMENT.

The action in the lower court was brought by various railroad companies to contest and enjoin the order of the Interstate Commerce Commission in a general investigation instituted on its own motion in docket No. 26712, entitled *Rail and Barge Joint Rates.* (R. 78) The order would require the observance of a prescribed new system of differentials to be deducted from all-rail rates to make joint rates for the through common-carrier transportation of package freight partly by rail and partly by river barge from and to various key points in the greater Mississippi Valley. The term "rail-barge" means also barge-rail or rail-barge-rail.

The Commission prescribed the new differentials in an original and supplemental report. (270 I. C. C. 591 and 274 I. C. C. 229; R. 16-77.) The effective date of its order has been postponed because of the pendency of this court proceeding.

A rather general system of rail-barge rates is already in effect in the territory involved and has been for a number of years. The present rail-barge rates in most instances are differentially much lower than the all-rail rates between the same points. The first rail-barge rates, which were limited in number, were established by the Director General of Railroads, shortly after he undertook the revival of barge transportation during the first World War under Congressional authority. Others were established in purported conformity with general principles outlined by the Commission in a complaint case brought by the War Department as operator of the Government's barge line in the early "twenties", a few years after it succeeded the Director General as operator of the river facilities. *U. S. War Department* v. *Abilene & S. Ry. Co.*, 77 I. C. C. 317; 92 I. C. C. 528; 151 I. C. C. 91. Later, in conformity with the Inland Waterways Corporation Act, 45 Stat. 979, 49 U. S. C. § 151-156, a comprehensive system of joint rates became effective under findings and orders of the Commission in connection with applications for operating rights by the Inland Waterways Corporation, which succeeded the War Department in 1924 and has since operated the facilities as the Federal Barge Line. Similar findings and orders in connection with applications by two other important river carriers, the Mississippi Valley Barge Line Company and The American Barge Line Company, further developed the fabric of joint rates. See *Procedure Under Barge Line Act*, 148 I. C. C. 129; *Through Routes and Joint Rates*, 153 I.C. C. 129; 156 I. C. C. 141; 163 I. C. C. 716; 172 I. C. C. 525; *Inland Waterways Corp.* v. *Chicago G. W. R. R.*, 129 I. C. C. 521; *Inland Waterways Corp.* v. *Aberdeen & R. R. Co.*, 183 I. C. C. 765; *Inland Waterways Corp. Through Routes and Joint Rates*, 192 I. C. C. 663; and *United States* v. *Illinois Central R. Co.*, 291 U. S. 457. Although the law under which the existing rates were prescribed has been repealed, the rates must continue in effect until ordered canceled. (Sec. 320 (e) of Interstate Commerce Act, 49 U. S. C. 153(e) quoted on p. 45, Appendix No. 1 hereto.)

The barge-line rates between river landings, i.e., the barge lines' own port-to-port rates, have, as a rule, for many years been made 20 percent below the corresponding all-rail rates between the same points and, generally speaking, the resulting differences in cents per 100 pounds on port-to-port traffic were used as the differentials for making the existing rail-barge rates embracing the same river transportation. For example, if the all-rail rate from New Orleans to St. Louis, Mo., on certain traffic were $1.00 per 100 pounds, the barge rate would be 80 cents, making a 20-cent difference, and the joint rail-barge rate from New Orleans to Jefferson City, Mo., for example, for a movement by barge as far as St. Louis and by rail beyond would be made 20 cents less than the all-rail rate from New Orleans to Jefferson City whatever it might be. The Commission's original report in No. 26712 covers these matters more fully and in more detail.

The rates required by the Commission's order here under review were prescribed in Findings 1 and 2 of its reports (R. 51, 52 and 76), based on the differentials named in the second, third, and fourth blocks of points in the first column on page 622 of the original report. (R. 55) Taking northbound traffic for illustration, these rates would apply by common-carrier barge up the Mississippi River from New Orleans to some river landing north thereof and thence by rail. The landing where the freight is transferred from barge to railroad car would be one of the many that are specified in connection with the differentials in the Commission's original report, dependent upon the location of the destination and the route beyond the transfer point.

The case of the Texas interests is directed primarily against the rail-barge rates between New Orleans, on the one hand, and interior western points between the Mississippi River and the Rocky Mountains, on the other. Galveston and Houston are ports of entry and egress for import, export, coastwise and intercoastal freight traffic having origin or destination in this interior territory. With

respect to that traffic which moves inland by rail from or to Galveston and Houston, these two ports are in keen competition with New Orleans. Galveston and Houston having no navigable waterway into the interior West, are generally confined to all-rail routes and rates. But New Orleans has, and under the Commisison's decision would continue to have, rail-barge rates from and to the interior West differentially much below the corresponding all-rail rates, notwithstanding the fact that the record in this case shows, and the Commission has found, that the rail-barge routes operate at costs that at least are as great as the all-rail costs. The present and prescribed rates for New Orleans are thus seen to be arbitrarily made lower than they should be. They would artificially afford competitive advantages for New Orleans interests, while depriving the Texas port interests of their inherent advantages of location and subjecting them to grave injustice and serious injury. This discrimination is particularly pronounced with respect to rates between New Orleans and a wedge-shaped territory embracing northwestern Louisiana, northeastern Texas, the eastern half of Oklahoma, the western half of Arkansas, western Missouri, most of Kansas, eastern Colorado, and states north of the three last mentioned. This territory includes such important points as Shreveport, La., Texarkana, Ark.-Tex., Oklahoma City and Tulsa, Okla., Fort Smith, Ark., Wichita and Hutchinson, Kan., Kansas City, Mo., and Denver, Colo. As is well known, it is a populous region; a great producing and consuming territory. It lies for the most part almost directly north of the Texas ports, but northwest of New Orleans. It is much farther from New Orleans than from the Texas ports. For example, Wichita is 627 miles from Houston, but 838 miles from New Orleans. Notwithstanding the much greater distances, New Orleans gets the same all-rail rates on a number of export and import commodities as the Texas ports, this having come about through the railroads' according New Orleans the Galveston and Houston rates for competitive reasons. The rail-barge differentials are deducted from these depressed

all-rail rates from and to New Orleans to make rail-barge rates, and New Orleans thus gets doubly depressed rail-barge rates which are even less than the all-rail rates charged Galveston and Houston. One example of how the Commission's decision works out should suffice. Imported green coffee from Brazil, shipped from New Orleans to Wichita, furnishes a good one. Wichita is a point as to which the railroads have accorded New Orleans the same all-rail rate as applies from Galveston and Houston to Wichita, viz.: 70 cents, regardless of the fact that New Orleans involves a much longer haul. Without going into detail suffice it to say that under the Commission's decision as we understand it New Orleans would get a rail-barge rate of 64 cents, while Galveston would continue to pay a rail rate of 70 cents, although it costs a rail-barge route at least as much to transport freight as a rail route.

At one of the several hearings in the Commission's proceeding the Galveston and Houston interests introduced a large amount of substantial evidence regarding their competition with New Orleans interests in drawing traffic from and shipping traffic into the interior West and regarding the adverse and injurious effect upon the Galveston and Houston interests of differential rail-barge rates between New Orleans and the interior territory. Among other things they showed the difficulties they faced in trying to induce new industries, distributing houses, importers, and exporters to locate at Galveston and Houston and told about efforts to build up a coffee market to serve the interior, which proved unsuccessful because of the competition from New Orleans unnaturally fostered by preferential rail-barge rates. Subsequently their opponents had ample time and opportunity to refute this affirmative proof, but did not do so. The testimony of the Texas interests occupied the best part of a day. It amounted to about 160 pages of transcript, and there were four exhibits. (I. C. C. R. 9466-9626; Exhibits 1032-1035.) See Appendix No. 2 hereto containing quotations from the transcript. The Texas interests filed a reply to the Federal Barge Lines' exceptions to

the Examiner's report, orally argued the case, and after the first report of the Commission they filed a petition for modification of the conclusions, thus giving the Commission opportunity to correct all errors.

However, Galveston and Houston got recognition from the Commission only in the form of passing mention in its original report; namely, in the final sentence of the paragraph ending near the bottom of page 611 (R. 42); in the final sentence of the paragraph ending at the top of page 616 (R. 48); in the paragraph at the bottom of page 617 (R. 50); and in the proviso in Finding 2, on page 619. (R. 52) Nowhere did the Commission set forth or even summarize the facts presented by the Texas interests or give them any assurance that their evidence had been adequately evaluated and considered at the time of the decision as it should have been under the law. Furthermore, the report made no finding pro or con on the issues raised by the Texas interests, but left those matters in the air.

Decisions of this Court set standards of conduct and action for administrative tribunals such as the Commission. Refusal to consider evidence of substance is arbitrary. *Chicago Junction Case*, 264 U. S. 258, at 265. By this means a regulatory body could tacitly sanction any unlawfulness. It is necessary to make findings essential to the constitutional and statutory validity of an order. *Florida* v. *United States*, 282 U. S. 194; 215; *United States* v. *Baltimore & O. R. Co.*, 293 U. S. 454; 465; and *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499; 504; 510. The grounds for the Commission's determination must be clear. *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475; 488. A report should contain sufficient explication to enable the parties and the courts to understand, with a fair degree of assurance, why the Commission decides as it does. *Eastern-Central Assn.* v. *United States*, 321 U. S. 194; 211. *Republic Aviation Corp.* v. *National L. Rel. Bd.*, 324 U. S. 793; 803. The Commission was remiss in these respects. Its errors are fatal and constitute grounds for setting aside its reports and order.

ERRORS.

Appellants rely upon all errors specified in their assignments of errors (R. 199-209), but will direct their argument primarily to the following, which are fundamental and generally embrace the others. The lower Court erred:

1. In failing to set aside and enjoin the order of the Commission.

2. In holding that the findings of the Commission are clearly sufficient to sustain its order and that such findings are supported by substantial evidence, have a rational basis upon which to rest, and are not arbitrary.

3. In finding that neither the wording nor the legislative history of section 307(d) of the Interstate Commerce Act, 49 U. S. C. 907(d) supports the conclusion that differentials are justified only where there is an affirmative showing of lower operating costs for barge-rail than for all-rail transportation.

4. In not finding that the record in the case before the Commission afforded no facts on which differentials could be justified for barge-rail rates between New Orleans and interior points west of the Mississippi River.

5. In not holding that the Commission unlawfully failed to find whether the base rates from which the differentials were to be deducted were reasonable either as maxima or minima, or were otherwise lawful as bases for the prescribed rail-barge rates for New Orleans.

6. In not holding that the Commission's reports and its order lack findings and conclusions essential to their constitutional and statutory validity respecting all rates prescribed and particularly those between New Orleans and interior points west of the Mississippi River.

7. In not holding that if the Commission is correct in construing the differential provision of Section 307(d) of the Interstate Commerce Act, 49 U. S. C. § 907(d), as a

mandate for rail-barge differentials for New Orleans regardless of whether factual justification exists, that provision is unconstitutional, in violation of Article 1, Section 9, Clause 6 of the Constitution, because the provision prefers Louisiana and other States having ports served by inland waterway carriers over Texas and other States having ports not so served.

8. In not holding that Finding 2 of the Commission, as revised in the supplemental report (274 I. C. C. at 230. R. 76), is arbitrary because the proviso therein undertakes to determine rail-barge rates by a test which takes into account only the rail portion of the through haul and that portion only where it exceeds a certain measure, disregarding the barge haul altogether.

9. In not holding that Finding 1 (270 I. C. C. at 619. R. 51), of the Commission is arbitrary, because it contains no limitation on the operation of the class-rate differential formula, although the necessity for a limitation on the entire differential system is recognized in principle by the proviso in Finding 2.

SUMMARY OF ARGUMENT.

The Commission's order was made under purported authority of section 307(d) of the Interstate Commerce Act, 49 U. S. C. 907(d), which provides that the Commission may require such reasonable differentials in connection with joint rates between rail carriers and water carriers "as it may find to be justified". In administrative law this means that the prescribed rates must be justified as reasonable by proved facts upon a formal record. The Commission stated in its report that it could not find that rail-barge routes could operate at any cost economy, compared with rail routes, which would justify differentials. (270 I. C. C. at 606. R. 36.) Nevertheless, it ordered differential rates because it believed Congress wanted that done, for the purpose of fostering water carriers. (270 I. C. C. at 610. R.

40.) However, the national transportation policy of Congress as declared in the Interstate Commerce Act at the time of the enactment of section 307(d) is that the advantages and disadvantages of each competing form of transportation shall be recognized and preserved in making rates. (Quoted on p. 44, Appendix No. 1 hereto.)

The Commission appears to have sought to bolster its action by the proved fact that rail-barge service is inferior to rail service and is therefore worth less to the shipper. However, it has always held, and properly so, that economy in cost is the primary or basic reason for differentials. Value of the service is merely a secondary and subordinate element in rate making and can not rationally be used as a justification in the face of the failure of the barge lines to prove that they have any cost economy.

The privately-owned barge lines find this traffic generally unprofitable and for that reason have embargoed practically all of it. The Federal Barge Line still handles the traffic, although its facilities are antiquated and in bad repair and although it has operated at a loss almost continuously since it was organized. If the privately-owned lines cannot handle the traffic at a profit, it is natural to conclude that Federal can not. Federal has offered nothing to dispel the doubt, and it is unlawful for a carrier to handle traffic at a loss.

The Commission in arbitrarily disregarding costs and transportation conditions and irrationally using value of service as a justification for differentials, *ipso facto* would accord New Orleans a system of rail-barge rates which being unnaturally low would unduly prefer that port over the competing ports of Galveston and Houston. The Commission thus obviously violates section 3(1) of the Interstate Commerce Act, which prohibits undue prejudice to ports, and which it was constituted to enforce.

The Commission prescribed the differentials without determining whether they would result in reasonable rates for the rail-barge routes. The Commission cannot lawfully prescribe a rate level unless it finds it to be reasonable.

The Commission in prescribing rates in disregard of cost has construed the differential provision of section 307(d) of the Interstate Commerce Act as a mandate to favor rail-barge routes without justification in fact. If it is correct in its construction, that provision is unconstitutional, in violation of the anti-ports-preference clause of the Constitution, because it arbitrarily prefers States having ports, such as New Orleans, served by inland waterways, over ports of other States not so served, the preference being arbitrary because it is not based on any fact, but solely on Congressional fiat.

The Commission has prescribed rates which arbitrarily take into account only the rail portion of the through haul; that is, they disregard the barge haul altogether. This matter is fully explained later in the brief.

ARGUMENT.

I.

Irrational and Arbitrary Disregard of Costs and Other Transportation Conditions.

The Commission in prescribing these new rates acted under authority purportedly contained in Section 307(d) of the Interstate Commerce Act, as amended, 54 Stat. 937 (49 U. S. C. § 907(d)), which section, after giving the Commission power to require the establishment of joint rates for rail-water transportation, provides as follows:

> In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water.

This provision is complementary to sections 15(1) and 15(3) of the Interstate Commerce Act, 49 U. S. C. 15(1) and 15(3), which empower the Commission to prescribe reasonable joint rates, including rail-water rates.

The record before the Commission contained a large amount of evidence regarding what it cost all-rail routes as compared with rail-barge routes to transport freight. This evidence, consisting of oral testimony and exhibits, was offered by witnesses on both sides. It was referred by the Commission to members of an employee staff of cost-finding experts, who analyzed it and at one of the hearings presented a summary thereof, adequately supported by detailed data, explanations and reasons. The general conclusion of the experts was that rail-barge costs exceeded rail costs, due largely to the relatively high cost of barge terminal operations and the cost of handling the freight between barges and railroads at river-landing transfer points. (270 I. C. C. at 604. R. 33.) After considering this matter, together with continued Federal Barge Line deficits and privately-owned barge-line refusals to handle the traffic in question because it was generally unprofitable, the Commission made the following statement:

> In the face of these facts we cannot find that at the present time there are demonstrable economies in barge-rail transportation on the Mississippi River and its tributaries, including the Warrior, which from the standpoint of cost of service would justify differentials. (270 I. C. C. at p. 606) (R. 36)

In other words, the Commission could find no cost basis for prescribing rail-barge rates. The District court treated the above-quoted statement of the Commission as a "negative conclusion, which does not constitute an affirmative finding that all-rail costs are lower than barge-rail costs", and the court held that the railroads had failed to establish that rail-barge costs were as great as or greater than rail costs. (88 F. Supp. at 987. R. 183.) However, we say that the Commission's language plainly means only one thing, namely, that rail-barge costs are at least as great as rail costs. The evidence certainly called for an affirmative finding to this effect and it was error if the Commission's statement was negative. Furthermore, if the Commission

felt that the cost data called for only a negative conclusion or were for any reason unusable, it was its duty to further investigate and get satisfactory data, because under the very terms of the differential provision of section 307(d) it has the duty of *finding justification* before prescribing differentials; and justification in cost or transportation conditions is essential in a case of this kind. It is here interesting to note that about ten years ago, after the Commission got rather complete jurisdiction over motor and water transportation, as it already had over rail transportation, it set up and developed in its organization a well-equipped cost-finding staff. In other words, the Commission was fully conscious of the fact that, in order to properly regulate competing forms of transportation, data as relative costs were necessary. It was members of this cost-finding staff who testified, as above stated, that barge-rail costs exceed all-rail costs.

In *Petroleum and Petroleum Products, Calif., to Ariz.*, 241 I. C. C. 21, the Commission was investigating the rates of two competing forms of parallel transportation, viz.: railroads and motor carriers. At page 241 of its report, it referred to the national transportation policy as then expressed in the Interstate Commerce Act with respect to railroads, and the policy declared in the Motor Carrier Act with respect to motor carriers. These policies, or rules of rate making, particularly so far as the present case is concerned, were not materially different in principle from the policy now stated in the opening paragraph of the Interstate Commerce Act (quoted on p. 41, Appendix No. 1 hereto) which requires equality of treatment for all regulated forms of transportation and preservation of the advantages enjoyed by each. The Commission then went on and said:

> The corresponding rule of rate making for motor-carrier rates is contained in section 216(i) of the Motor-carrier act. The two rules are practically identical except that the motor-carrier rule contains the added

direction that consideration shall be given "to the inherent advantages of transportation by such carriers." This additional provision was included to make certain that the motor carriers would be regulated with a view to the conditions inherent in the motor-transportation industry without regard to the interest of any other mode of transportation. In fairness, we should give consideration to the inherent advantages of transportation by rail when rates by rail carriers are before us, particularly in a proceeding where competing rates of motor carriers are also under review. The two rules for rate making, together with section 202(a), indicate the policy of Congress to be that in the regulation of these transportation agencies we should recognize and preserve in the interest of the public the inherent advantages of each. *The inherent transportation advantage possessed by the rail carriers in transporting petroleum and petrolum products from California to Arizona is the relatively low cost of rail service. The element of cost is not the only factor to be considered in determining the reasonableness of the rate to be charged, but it may become the dominant factor where two different modes of transportation are competing for the same traffic. In such a case the other factors which influence the fixing of rates such as volume of movement, value of service to the shipper, and the value of the commodity carried are of less importance.* (Italics ours.)

Particular attention is called to the italicized portion of this quotation, which mentions cost as a dominant element. In considering the rates of competing forms of transportation, cost surely is a dominant element and should not be wholly disregarded as the appellees contend it may be. It was the duty of the Commission to consider relative costs in this case. Cost is too important an element to be cast aside. It is always a basic, primary and necessary consideration in cases of this kind. *Inland Waterways Corp.* v. *Alabama G. S. R. Co.*, 151 I. C. C. 126, at 133 and 144; *Through Routes and Joint Rates*, 153 I. C. C. 129, at 133; *Inland Waterways Corp.* v. *Aberdeen & R. R.*, 183 I. C. C. 761 at 765.

The Commission held in the present case that an affirmative showing of cost economy for the rail-barge routes was not necessary to justify the prescription of differentials. (270 I. C. C. at 611. R. 41.) The lower court has the same view, but neither body cites any authorities. (88 F. Supp. at 987. R. 179.) Regardless of whether the showing has to be affirmative, the truth is that a record must contain facts that justify the differentials. The Commission, after finding no cost justification for differentials, stated that in no instance had it ever declined to prescribe or approve differential rates because the economy of barge service had not been affirmatively shown. (270 I. C. C. at 611. R. 41.) Its statement is at variance with finding 2 in the earliest Federal Barge Line case, *U. S. War Department* v. *A. & S. Ry. Co.*, 77 I. C. C. 317, at 362, decided February 6, 1923, where the Commission said it was not persuaded that the rail-barge rates there sought should be established where the barge line's share of the joint haul would be so short that interchange expenses at the river-landing transfer point would be so great as to off-set the lower cost of water transportation, which is just the situation presented in the present case. It probably is true that after the enactment of the Denison Act, May 29, 1928, 45 Stat. 980, the Commission did not decline to prescribe or approve differential rates where affirmative proof of economy was lacking, because under that Act it felt that it had a mandate provisionally to prescribe such rates without a hearing. See *United States* v. *Illinois Central R. Co.*, 291 U. S. 457. That was based on the traditional belief then prevailing that port-to-port barge service could be performed more economically than rail service, and that the economy should be reflected in rail-barge rates upon the assumption or presumption that rail-barge costs were lower than rail costs. However, the Denison Act was repealed October 1, 1940, by § 320(e) of the Interstate Commerce Act, 54 Stat. 95 (49 U. S. C. § 920) long before the Commission prescribed the rates covered by the order here under review and so far as these rates are

concerned the Commission was bound to operate under the Interstate Commerce Act alone, which did not give it freedom to disregard sound and important principles of law and rationality. It was the prescription of rail-barge rates without hearings and without facts, which finally brought railroad complaints and precipitated the Commission's investigation giving rise to this court proceeding.

There would be no reason to think that the cost situation as disclosed by this record is anomalous or absurd. It is axiomatic that water carriers, operating on public waters, do not have to provide and maintain roadways, and that their costs accordingly represent, in unusual degree, their terminal and interchange operations performed by labor forces. During the past few decades wages have risen out of proportion to other things and thus have disrupted the relative costs of rail versus water transportation. It is interesting to here note a most recent decision of the Commission. *All-Rail Commodity Rates between California, Oregon and Washington*, 277 I. C. C. 511, where (at p. 554-564) it was found that the cost of moving freight between California and the North Pacific Coast was less by rail than by ship. An assumption or presumption that rail-barge transportation can be performed at less cost than rail transportation is entirely without foundation.

In disregarding cost and transportation conditions the Commission acted arbitrarily and without a rational basis.

II.

Assumed Mandate to Prescribe Rail-Barge Rates.

The Commission in its report indicates that it prescribed the differential rates primarily because it believed that Congress wanted it to foster water carriers. Its belief was gathered from legislative history antecedent to the enactment of section 307(d) of the Interstate Commerce Act and from section 3(c) of the Inland Waterways Corporation Act (p. 39, Appendix No. 1 hereto), which latter declares it to be the policy of Congress to continue the transporta-

tion services of the corporation until, among other conditions, rail-water rates are generally available *reasonably fair to both rail and water carriers.* (270 I. C. C. at 610. R. 40.) In so far as it may have a bearing on the Commission's duties, this statutory provision means only that rates and divisions prescribed by the Commission must be just and reasonable and in accord with the declared national transportation policy. The lower court stated that "the Commission placed great emphasis on what is conceived to be the policy of Congress." (88 F. Supp. 987. R. 179.) However, it is clear that Congress did not give the Commission any mandate or directive in respect of the above matter, for at the very time it enacted section 307(d) it formally declared in the opening paragraph of the Interstate Commerce Act that the national transportation policy contemplated fair and impartial regulation of all modes of transportation. (Quoted on p. 41, Appendix 1 hereto.) Even if Congress had given the Commission a mandate or directive it could not lawfully have been used as a basis for the prescription of differentials for the rail-barge routes unless on the facts of record such action was warranted under sections 1(5)(a) and 15(1) of the Act, irrespective of the mandate or directive. In other words, the record would have to show that the prescribed rates were just and reasonable according to accepted and usual standards. *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658, and *United States* v. *New York Central R. Co.*, 263 U. S. 603.

III.

Irrational Use of Value of the Service as an Element of Rate-Making.

The District court says that numerous factors besides the Commission's conception of the policy of Congress were considered by the Commission. (88 F. Supp. 987. R. 179.) If they exist, they are difficult to find or identify. Apparently what the court had in mind was the discussion in the

Commission's report under the heading "The Shippers' Interest in Rail-Barge Transportation." (270 I. C. C. at 606-609. R. 36-39.) The only thing the court particularly dwells upon is the fact that the rail-barge service is inferior to rail service; that is, the value of the service to the shipper is less via rail-barge, due to slow movement. (88 F. Supp. 987-988. R. 177-180.) The other things it mentions in passing boil down to the idea of artificially promoting rail-barge transportation at the expense of the railroads.

Aside from an assumed Congressional policy, about the only rate-making factor possibly used by the Commission as justification was the value-of-service element. Application of that factor here, if that was what occurred, with costs and transportation conditions disregarded, was absolutely irrational to the nth degree. It was nothing short of an arbitrary move to divert traffic from the railroads to the rail-barge routes, and its disastrous effect, so far as we are concerned, was to prefer the port of New Orleans over the ports of Galveston and Houston.

Let us examine the value of the service element. In considering the price it should charge for a service, the carrier's first duty to itself and the public is to see that the rate yields profit. No carrier can stay in business indefinitely if it follows any different policy. After it has an idea of what its costs and its profit in handling a particular traffic may be, on the basis of a normal or mathematical distribution of indirect, or general overhead, expenses it can consider the value of the service to the shipper. That is always and necessarily an ancillary and subordinate element in rate-making, because always and necessarily it must be coupled with a basic element, viz.: cost of service or transportation conditions. Obviously, application of the value-of-service element has limits. It can extend to only a portion of the margin of profit. It is merely a tempering, mollifying, or moderating treatment. For a carrier to use value of service as a primary and practically exclusive ele-

ment would constitute commercial dissipation and destructive practice. The Commission, in the nature of things, must be governed accordingly in prescribing rates. When it prescribes rates on the basis of value of service it must know that they will yield fair profit. It could not have known that upon this record. In the absence of justification in cost or transportation conditions, evidence respecting such things as value of the service furnish the other side with nothing more than talking points.

The District Court states that the Commission has previously designated the lesser value of the rail-barge service as one basis for differentials. (88 F. Supp. 987. R. 179-180.) It cites *Inland Waterways Corp.* v. *Alabama Great Southern R. Co.*, 151 I. C. C. 126, at 144, but its statement is narrow and incomplete and therefore leaves a very wrong impression. What the Commission said was this:

> The barge-line differentials are based upon *the premise* that the service costs less and is worth less than the rail service with which it competes. From the standpoint of public policy, however, the important factor is the lesser cost of the service, for there could be no justification for encouraging an inferior service having a higher cost. (Italics ours.)

The Commission did not there say that inferiority of service could be considered as substantially the sole justification for differentials, but made it plain that inferiority of service as a justification had to be accompanied by lower costs. It coupled cost of service and value of service and spoke of the two as "the premise". It may be said incidentally that the Commission did there prescribe rail-barge rates, in the face of a finding that "the evidence in regard to cost of service is meager", but that was over 20 years ago, when it was the common practice to do so, in accordance with the Denison Act, since repealed as already mentioned.

The District Court gravely erred in taking such considerations as value of service as basic and important elements,

particularly in view of its complete disregard of costs and transportation conditions. Neither the court nor the Commission had a rational basis for its action. We are not overlooking such things as administrative finality and the Commission's recognized expertness in matters of rate-making. What we are here dealing with is abuse of discretion, which of course is unlawful under well-known decisions of this court.

IV.

Rail-Barge Traffic Handled at Less Than Cost.

In view of the facts we are about to relate, bearing upon cost and transportation conditions, we fail to see how the rates which the Commission has undertaken to impose upon the rail-barge routes could, by any stretch of the imagination, be said to have been justified on the record as just and reasonable. In other words, we say that the Commission was arbitrary.

Here is something the Commission said in its report:

> In his testimony before the subcommittee mentioned above, Federal's president stated that "many large operators, private, contract, and common carriers have better, more efficient fleets and provide faster and more dependable service than the Federal barge lines." He pointed out, however, that the private lines[1] have also encountered the problem of rising terminal costs and *do not want* most types of merchandise freight because of the high cost of handling it under present terminal methods.
>
> This development is illustrated by the experience of Valley,[2] whose increasing proportion of bulk freight since 1941 has previously been mentioned. In that year it interchanged more than 325,000 tons of freight with railroads, but in 1947 its joint traffic was only 37,000 tons. This decline of 89 percent apparently was due in large part to embargoes placed against rail-barge traffic by Valley *in order to avoid a serious loss*

[1] Obviously means "privately owned".

[2] Means Mississippi Valley Barge Line Company.

> *of revenue* owing to the expense of transferring freight between barges and railroad cars. Although it still has some hope of profitable participation in this joint traffic at a future time, the outlook is obscure. (Emphasis supplied.) (270 I. C. C. at 606. R. 35.)

The Commission noticed that the Mississippi Valley Barge Line's rail-barge traffic in 1947 was less than 2 percent of its total traffic, compared with more than 55 percent in 1941. (270 I. C. C. at p. 596, R. 23) The Commission also noticed that the American Barge Line's rail-barge traffic was insignificant in 1947, having been but 3,084 tons, as against its total traffic of 1,385,666 tons. (270 I. C. C. at 597, R. 24) Federal, in the five years immediately before the war, handled about a million tons per year, but the figure for 1947 was only 369,217 tons. (270 I. C. C. at 595, R. 22)

The embargoes mentioned in the above quotation were laid to avoid unprofitable traffic and not because of the physical inability of the carrier due to congestion, strikes, or other emergencies. We have always understood that embargoes were legally justifiable only as a temporary means of avoiding traffic that a carrier was physically unable to handle. Our New Orleans opponents in this very case must have the same understanding, for they have filed with the Commission some formal complaints alleging that embargoes of the above two privately owned barge lines at New Orleans against package traffic are unlawful. No. 30118, *New Orleans Traffic and Transportation Bureau* v. *Mississippi Valley Barge Line Company*, covering all the traffic, and No. 30123, *New Orleans Traffic and Transportation Bureau* v. *American Barge Line Company*, covering the north-bound traffic. The cases have been heard and are awaiting oral argument. The defendant barge lines are here in the anomalous position of fighting for confiscatory rates.

It can not be assumed that Federal is able to handle this traffic at a profit if the two other lines can not, for while the

Mississippi Valley and American barge lines have been consistent money makers, Federal has generally operated at a loss since it was organized over 30 years ago. (270 I. C. C. at 595-596, R. 22) We here ask the court to read and absorb what the Commission says about the dilapidated condition of Federal's facilities and high operating expenses. (270 I. C. C. at 604-606, R. 33-35) The only thing that Federal offered the Commission in this connection was a statement of hope. If the facilities were so run down three years ago, they must be in worse condition today. If the additional subsidy of $17,000,000 mentioned in the report was needed in 1947, (270 I. C. C. at 605, R. 34) how much is needed in this present period of high prices? And what about the interest on the money?

For all practical purposes it may be said that Federal is now the only barge line participating in rail-barge traffic. For policy reasons, including the fact that the line was established as a temporary Government experiment in river transportation to serve the public, its officials may not feel free to refuse or actually discourage the business. They apparently do not concern themselves about losses as the privately owned lines do. Federal is subsidized and its financial needs are thus taken care of largely out of public funds derived from taxes paid directly or indirectly by everybody, instead of by the users of the service. However, it is unlawful for a carrier to handle business at a loss. Traffic that does not contribute in fair proportion to a carrier's needs places a burden on other traffic. *Northern Pacific Ry. Co. v. North Dakota*, 236 U. S. 585, at 602-604. Although Federal is a Government agency, its affairs must be conducted according to law and sound business standards if it is to be a true experiment. *U. S. War Department v. A. & S. Ry. Co.*, 92 I. C. C. 528 at 535.

The lower court did not overlook the facts above outlined, but seems not to have gotten their full import. There is no book-keeping proof stated in dollars and cents that rail-barge traffic is and would be handled at a loss, but the

testimony referred to in the above quotation and the fact that the privately owned barge lines, according to the latest data, are practically out of this business, cast over this traffic a very dark shadow which the record does not dispel. The barge lines are the parties who sought the continuance of rail-barge rates and they therefore had the obligation of resenting convincing proof that rates were "justified" as just and reasonable under sections 1(4), 1(5)(a) and 307(d) of the Interstate Commerce Act and of showing what those rates should be. They failed. And it was not for us to prove that the differentials were just and reasonable.

For the Commission to override these facts and their plain significance without positive evidence that the rates would yield sufficient profit to make them just and reasonable maxima was arbitrary. Upon a proper record the Commission has power to force rates down to a reasonable maximum level or force them up to a reasonable minimum level, but it has no power to require carriers to take freight at less than a reasonable maximum level, because that would unconstitutionally deprive the carriers of their property right to a reasonable return. *Northern Pac. Ry. Co.* v. *North Dakota*, 236 U. S. 585.

V.

The Prescribed Rates Violate the Declared National Transportation Policy.

The Commission prescribed the preferential rail-barge rates for New Orleans and other points through misunderstanding of the national transportation policy declared by Congress in the opening paragraph preceeding § 1, of the Interstate Commerce Act, 54 Stat. 899. (49 U. S. C.) (Quoted at p. 41, Appendix No. 1.) The portion of the declaration here pertinent is quoted below for convenience:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation sub-

ject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; * * *

As applied to this case the quoted phrase contemplates a recognition and preservation of the inherent *advantages* of rail versus rail-barge service. What are the inherent advantages of rail-barge service which are claimed to justify differentials? None have been proved. The rail-barge routes have nothing to offer except *disadvantages*, namely, high costs, losses and inferior service. For the Commission arbitrarily to prescribe rates that overcome these disadvantages is to deprive the rail routes of their advantages.

Under Reorganization Plan No. II, 53 Stat. 1434, the Secretary of Commerce has operated the Federal Barge Line since July 1, 1939. His printed report to the President of the United States, dated December 1, 1949, entitled "Issues Involved in a Unified and Coordinated Federal Program For Transportation," contains the following language beginning new the bottom of page 45:

"* * * the Government should consider continuing its various promotional programs along lines which call for payment by the user for the various facilities. Government regulatory agencies should simultaneously consider the elimination of rates which are not closely related to the fully distributed cost of rendering the service. If action along both lines were to proceed at the same time, most of the legitimate complaints which the railroads have against their competing carriers would be eliminated and most of the legitimate complaints which water and motor carriers have against the rail carriers would be disposed of. The net result would be a more effective use of transport resources with each type of carrier performing the various services in which it had a cost advantage. This, after all, is the basic objective of the Transportation Act of 1940, and action of the sort just described appears necessary in order that the objective of the 1940 act may be realized."

We cannot reconcile these sound statements of the governing head of the Federal Barge Line with the position taken by that line's officials in this case.

This is not a case in which one form of transportation is voluntarily making rates to meet a competing parallel form by the maintenance of compensatory rates, but one in which the power of the Government is sought to be used unlawfully to compel one form of transportation which has a natural cost-of-service advantage to give up traffic and revenue to a high-cost competing form. The Commission and the lower court fell into fatal error by failing to recognize this distinction.

The Commission mentions the fact that the barge lines are willing to allow their railroad connections the same divisions or proportions of the through joint rates as the same railroads get out of joint rail rates applying via the same interchange or junction point. (270 I. C. C. at 612-613, R. 44) The lower Court also refers to the same matter. (88 F. Supp. at 987) (R. 179) Both tribunals imply that it helps the barge-line side of the case. Superficially it sounds plausible and therefore makes a talking point for the barge lines, but really there is nothing to it. It is simply a device for sucking traffic out of railroad channels. Suppose a rail rate of $1.00 from New Orleans to Wichita divides by allowing the railroad from New Orleans to Memphis 40 cents and the railroad from Memphis to Wichita 60 cents. Suppose the rate from New Orleans to Wichita via barge to Memphis and rail thence to Wichita is 85 cents. The barge line would allow the railroad west of Memphis its established division of 60 cents and accept the remainder of 25 cents as its own division, thus absorbing the 15-cent differential out of its own pocket. The barge-line argument is that the railroad west of Memphis should be satisfied. But what happens to the railroad south of Memphis? And incidentally this could be the same railroad as runs west of Memphis to Wichita. It loses the traffic to the barge line, although it has proved that the through costs of rail trans-

portation exceed those for rail-barge transportation and although the barge line has not proved that the rail-barge routes can handle the traffic at less cost than the railroads. This divisional device originated years ago, when it was commonly understood or believed that rail-barge transportation costs less to perform than rail transportation. Now that the reverse is true, it is a burden on the economy of the country for the Government to force the railroads to give up part of the haul and revenue on this traffic to a higher cost form of transportation. It is a violation of the declared national transportation policy. *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 576, at p. 574, 579. It is a bleeding of the railroads to artificially nurture the barge lines.

The Texas interests are not here undertaking to speak for the railroads, but for our own protection we must resist the vicious discrimination which the Commission would inflict and fasten upon us by the preference it would accord New Orleans.

VI.

The Commission Has Unlawfully Undertaken to Prescribe Rates Indirectly, Without Knowing Whether They Are Just and Reasonable.

The Commission in this case prescribed the relations it says should exist between the rail and the rail-barge rates. Its reports do not indicate that it even considered what the resulting rail-barge rates would be.

The District Court was arbitrary in permitting the Commission's order to stand in the face of a showing that the Commission required the prescribed differentials to be deducted from existing all-rail rates without any finding that the all-rail rates were reasonable as bases for such deductions. How could the Commission know whether the prescribed barge-rail rates would be reasonable or even compensatory without first knowing that the all-rail rates between the same points were reasonable? The Commission took a random shot in the dark. Even if the differen-

tials had been justified by the record, how could it be found as a conclusion that they would result in reasonable and lawful rates, for instance, on imported coffee, newsprint paper, sisal, bagging, canned goods, etc., without facts of record which prove that such rates are each reasonable and otherwise lawful and without findings of fact to support the conclusion? In *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, this Court affirmed a decree setting aside an order wherein the Commission undertook to condemn a proposal of a carrier to reduce certain of its rates on coal to a particular level, the Commission having failed to find that the proposed rates represented a departure from a rate relation that was intrinsically sound and fair. The Commission's decision there under review, like the one here, was based on the idea that certain rates must be maintained, even if unsound. The Court there pointed out that an order of the Commission is void unless supported by findings of the basic or quasi-jurisdictional facts conditioning its power.

For a pointed example of what the Commission has done let us again take coffee from New Orleans to Wichita. The all-rail rate is 70 cents. The prescribed rail-barge rate, as we construe the reports and order, is 64 cents. We ask opposing counsel to cite the facts of record which show that the 70-cent rate is up to the level of maximum reasonableness for all-rail transportation and the facts of record which show that the 64 cent rate is up to the limit of maximum reasonableness for rail-barge transportation. We do not know of such facts. The Commission cannot lawfully order the carriers to reduce or keep down a rate unless it exceeds the limit of maximum reasonableness. Section 1(5)(a) of the Interstate Commerce Act provides that all rates must be just and reasonable and section 15(1) and 307(d) of that Act provide the Commission with power to prescribe such rates. In the nature of things, the Commission cannot order a rate *down* to a level which is below the limit of maximum reasonableness, because it

would thus unconstitutionally deprive the carriers of their property right to a reasonable return. *Northern Pac. Ry. Co.* v. *North Dakota*, 236 U. S. 585. The only other power the Commission has with respect to the level of rates is to order them up to a minimum reasonable level, which matter is not here involved.

For these reasons the Commission's order should be held void.

VII.

Undue Prejudice to the Texas Ports.

Due to the Commission's arbitrary and irrational disregard of the evidence and its finding respecting the lack of economy in rail-barge service it prescribed rates for New Orleans that have no support in law and which therefore afford that point unlawful advantages over Galveston and Houston. In other words, the Commission proceeded to violate the law it was duty-bound to enforce, particularly section 3(1) of the Interstate Commerce Act, 49 U. S. C. § (1), which prohibits undue preference and prejudice of ports. Generally speaking, the railroads which necessarily and effectively participate in the rail-barge rates between New Orleans and the interior West are the ones which serve Galveston and Houston with their own rails or necessarily and effectively participate with others in joint all-rail rates from and to those ports within the meaning of *Texas & Pac. Ry. Co.* v. *United States*, 289 U. S. 627, 650.

The Court proceeds on the basis that if the differentials are lawful, New Orleans gets only what it is entitled to and that Galveston and Houston, not favored with a barge line into the territory west of the Mississippi River, can have no legal ground for complaint, because the law does not undertake to equalize natural advantages. (88 F. Supp. at 989-990, R. 183-184) The Court seems to have misunderstood us. We tried to make it clear that we sought no artificial advantages. Our position was that New Orleans was so situated geographically as to possess only natural disadvantages over Galveston and Houston, but was allowed

to ship to and from the West on lower barge-rail rates than were justified by facts, and that it was therefore the recipient of artificial advantages.

Instead of prescribing preferential rates for New Orleans the Commission should have found that the existing rail-barge rates were not justified and ordered them increased at least to the level of the all rail rates to cure the preference that has existed for years. The Commission was arbitrary in not doing so. Naturally, as there is no justification for the newly prescribed rates, there is none for the present rates.

VIII.

Unconstitutionality of the Differential Provision.

Under the Commission's construction and application of the above-mentioned differential provision of section 307(d) of the Interstate Commerce Act, New Orleans gets prescribed rail-barge differential rates from and to the interior West relatively and absolutely lower than the competing ports of Galveston and Houston have over all-rail routes, regardless of the fact that there are no facts of record to justify the discrimination.

The Constitution of the United States, in Article 1, Section 9, Clause 6, provides that:

> No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: * * *

In *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 18 Howard 421, the Supreme Court, after beginning a discussion of this clause of the Constitution, as it affects certain kinds of legislation, says, at the middle of page 435, that the prohibition against preference "may, certainly, embrace any other description of legislation looking to a direct privilege or preference of the ports of one State over those of another."

Congress in the nature of things has the right to designate certain points as ports of egress and entry, but when it has done so, it must of course treat all of the States alike

in matters affecting competition for commerce, except where there is some real and natural differences in circumstance and conditions. In other words, Congress can not, within the Constitution, arbitrarily say that the ports of certain States shall or may have unduly favorable rates.

If the differential clause of section 307(d) of the Interstate Commerce Act means what the Commission plainly thinks it means, that is, if it is a mandate from Congress to prescribe differentials without a factual basis in the record, it is unconstitutional, because it arbitrarily affords the State of Louisiana a preference over the State of Texas. The State of Louisiana and its citizens, through the preference that would be given the port of New Orleans by the prescribed rates, would be beneficially affected to the detriment of the State of Texas and its citizens. As construed by the Commission, the differential clause of section 307(d) is positive legislation providing arbitrary direct blanket preference of any State having a port served by a Commission-regulated water carrier which through rail-barge routes reaches a given inland territory in competition with all-rail routes. States having ports served only by all-rail routes reaching the same inland territory suffer unjustifiable discrimination.

It is, of course, hard to believe that Congress intended to prefer any State. We do not think it did intend to do so. We say that if you assume that the Commission's construction of the differential clause of section 307(d) is correct, it necessarily follows that Congress did in fact unconstitutionally prefer Louisiana and other States which have a port served by Commission-regulated water carriers, and did unconstitutionally discriminate against Texas and other States having no port so served. We say our contention is correct because the Commission in effect holds that it is bound to accord the rail-barge routes a differentially lower basis of joint rates with the railroads, even though such rates are not justified by facts found in the evidence. It follows, according to the Commission's construction and application of section 307(d), that if the rates are not justi-

fied by the record, Louisiana derives its port rate advantages artificially from arbitrary action by Congress; and not from the geographical location of New Orleans or from transportation circumstances and conditions surrounding movements from and to that port. And we should add that the Commission has many times held that it is not its function to so adjust rates as to afford any city or community artificial advantages or to require rates which will deprive a city or community of its natural advantages of location. See *Schroon River Pulp & Paper Co.* v. *Delaware & H. Co.*, 169 I. C. C. 435, 438; *Iron and Steel Articles from the South*, 176 I. C. C. 345, 353; and *Scrap or Waste Paper*, 179 I. C. C. 71, 74; supported by *Interstate Com. Com.* v. *Diffenbaugh*, 222 U. S. 42, at p. 46.

This discussion goes to show either that the differential provision of section 307(d) is unconstitutional or that the Commission's construction and application thereof, is wrong. In other words, if the differential provision is a mandate, it is unconstitutional; if it is not a mandate, there is here no basis for the prescription of differentials, for the record affords no justifying facts. Either view leads irresistibly to the conclusion that the Commission's order is unlawful.

IX.

Finding 2 is Arbitrary.

Finding 2 in the Commission's supplemental report (274 I. C. C. at 230, R. 76), is arbitrary. There are instances in which the prescribed rail-barge rates are much lower between New Orleans and interior western points than the all-rail rates between Galveston or Houston and the same interior points, notwithstanding the fact that the rail and rail-barge distances between New Orleans and those interior points are far greater than the rail distances between the Texas ports and the interior points. There are also startling and almost unbelievable instances in which the rail leg of the haul, that is, west of the river-landing trans-

fer point to the interior point, for example from Memphis inland, is almost as great as the all-rail distance from Galveston or Houston. In other words, the freight, after it gets off the barge at the river-landing transfer point, is as far, or almost as far, from destination as an all-rail shipment would be when it started from Galveston or Houston. There are, in addition, some instances in which the rail leg of the haul west of the river-landing transfer point is even greater than the distance between Galveston or Houston and the interior point.

Finding 2, as revised in the supplemental report, after prescribing that rail-barge commodity rates shall be related to the corresponding class rates by the use of a given percentage formula, contains a proviso[3] to restrict situations of the above kind, so far as commodity rates are concerned. The proviso in substance is that under the decision New Orleans is not to get a lower rail-barge commodity rate than Galveston or Houston where the rail distance west of the river-landing transfer point equals or exceeds the distance between Galveston or Houston and the interior point. It leaves unrestricted the situations where the rail distances west of the transfer point are less, notwithstanding the fact that the traffic from or to New Orleans has to move generally several hundred miles on the Mississippi by barge in addition to moving by rail practically as far as it would if shipped between Galveston or Houston and the interior western point.

Having recognized that a restriction is necessary for the protection of Galveston and Houston where the distances beyond the river-landing transfer point equal or exceed

[3] It reads: * * * provided, however, that this finding * * * shall not require the establishment of barge-and-rail commodity rates between New Orleans and an interior point which shall be lower than the rate on the same commodity between Houston or Galveston and the same interior point where the shortline rail distance between such point and Houston or Galveston is not greater than the short-line rail distance between the same point and the port of interchange in the barge-and-rail route to or from New Orleans.

those between Galveston or Houston and the interior western point, it is an unlawful abuse of discretion to refuse in the same breath a limitation where the distances beyond the river-landing transfer point are less. The proviso therefore makes Finding 2 arbitrary and unlawful, because it undertakes to determine rail-barge rates by a test which takes into account only the rail portion of the through haul, and that portion only where it exceeds a certain measure. The cost of the through rail-barge haul with relation to the cost of the all-rail haul should be the determining consideration.

After the issuance of the Commission's first report the Texas interveners filed a petition with the Commission suggesting an appropriate formula evaluating the barge service in terms of rail miles for addition to the rail distances between the river-lading transfer points and the interior points to arrive at through distances between New Orleans and the interior points for comparison with the all-rail distances between Galveston and Houston and the interior points. The suggested formula was of the kind used by the Commission in a previous rail-barge case, Ex Parte 96, entitled *Inland Waterways Corp., Through Routes and Rates*, 192 I. C. C. 663. In that case the Commission required the joint rail-barge routes to treat the barge service for the river distance of 1547 miles between New Orleans and Kansas City as the equivalent of 660 rail miles, this being approximately two-thirds of the Missouri Pacific Railroad's direct single-line rail distance of 992 miles between New Orleans and Kansas City. On the basis of such a formula the Commission could have converted the actual river distances between New Orleans and various river-landing transfer points into constructive rail distances for addition to the rail distances beyond the transfer points to make through distances for comparison with the rail distances beeween Galveston and Houston and the interior western points. These distances are shown in the record. See page 6 of Holloman's Exhibit 1033. (I. C. C. R. 9467)

The Commission in its final report continued arbitrarily to ignore the barge leg of the transportation.

X.

Finding 1 Is Arbitrary.

Finding 1 in the Commission's original report, 270 I. C. C. at 619, R. 51, is arbitrary, because it contains no limitation on the operation of the class-rate differential formula, although the necessity for a limitation on the entire differential system is recognized in principle by the proviso in finding 2. The arbitrariness is thus obvious.

XI.

Administrative Finality.

In the District Court our opponents urged that the Commission's decision was based on a substantial record and that therefore the case was controlled by decisions resting on the doctrine of administrative finality, such as *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, at 536. The court agreed with them. (88 F. Supp. 988. R. 181). That was error. Substantiality has reference to what is in a record, rather than its size. A substantial record is one which contains an adequate array of essential facts of real rate-making value. While this record contains some 16,000 pages of testimony, most of the evidence respecting the level or reasonableness of the rates is cost data, which the Commission violated. About one-fourth of the record is made up of cost data alone. (270 I. C. C. at p. 603. R. 32.) The remainder is mostly valueless generalities, as is evident from a reading of the Commission's reports. The Commission's action was based on a fractional part of the record covering the mere ancillary and subordinate matters, particularly value of the service, which furnished the basis for the discussion under the heading "The Shippers' Interest in Rail-Barge Transportation" in the Commission's report. (270 I. C. C. 606-609. R. 36-39).

This is not an ordinary rate case. It embraces fundamental rights of tremendous public and private consequence. The evidence is lacking with respect to basic and vital matters. Even if it could be said that the Commission acted upon a substantial record, its order is void because it has no rational basis and is the result of an abuse of discretion and disregard of fundamental facts. See *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, at 146. *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, at 536. *Chicago Junction* case, 264 U. S. 258, at 265.

The doctrine of administrative finality has its recognized limits, and these limits must be most carefully and jealously guarded by the courts in these days when administrative tribunals in the regulation of public affairs can so easily trespass upon the inherent rights of individuals.

The Texas interests accordingly ask protection at the hands of this court of last resort.

CONCLUSION.

The case should be remanded to the District Court with directions to enjoin the Commission's order and require the Commission to proceed according to the opinion of this court.

Respectfully submitted,

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October 16, 1950.

APPENDIX NO. 1.

Relevant Provisions of the Constitution and Statutes.

THE CONSTITUTION, Article 1, Section 9, Clause 6:

> No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

INLAND WATERWAYS CORPORATION ACT:

SEC. 3(c). 45 Stat. 979, 49 U. S. C. § 153 (c) It is hereby declared to be the policy of Congress to continue the transportation services of the corporation until (1) there shall have been completed in the rivers where the corporation operates, navigable channels, as authorized by Congress, adequate for reasonably dependable and regular transportation service thereon; (2) terminal facilities shall have been provided on such rivers reasonably adequate for joint rail and water service; (3) there shall have been published and filed under the provisions of the Interstate Commerce Act, as amended, such joint tariffs with rail carriers as shall make generally available the privileges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers; and (4) private persons, companies, or corporations engage, or are ready and willing to engage in common-carrier service on such rivers.

* * * * * * * * * *

Sec. 3(e). 45 Stat. 978-980. Repealed, effective October 1, 1940, by Sec. 320(e) of the Interstate Commerce Act. (e) Any person, firm or corporation, including the Inland Waterways Corporation, engaged or about to engage in conducting a common-carrier service upon the Warrior River or the Mississippi River, or any tributaries thereof, may apply to the Interstate Commerce Commission and obtain a certificate of public convenience and necessity in accordance with the provisions of section 1 of this title, and the Interstate Commerce Commission shall thereupon, by order, direct all connecting common carriers and their connections to join with such water carrier in through routes and joint rates with reasonable rules, regulations, and practices, as

provided in paragraph (3) of section 15 of[4] this title, and the commission shall, in such order, fix reasonable minimum differentials between all rail rates and joint rates in connection with said water service to apply until changed by order of the Commission. Such joint routes, rates, rules, regulations, and practices may be changed by order of the commission or by agreement of the water carriers and the other participating carriers. The commission shall further require the interested common carriers to enter into negotiations for the purpose of establishing equitable divisions of the aforesaid joint differential rates within thirty days after such joint rates are established, and if the carriers are unable to agree upon equitable divisions within one hundred and twenty days from date of publication the commission shall, by order, determine and establish reasonable divisions to become effective coincident with the effective date of the joint rates. The commission is hereby given authority upon complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning (1) the reasonableness or lawfulness of any through route or joint rate filed pursuant to such order of the commission, or (2) the reasonableness of any minimum differentials between all rail rates and joint rates in connection with any water service; or (3) the reasonableness of any division of joint rates ordered by the commission under the provisions of this[5] section; and after full hearings the commission may make such order with reference to any such matters as it may find to be proper and in the public interest. At any such hearing the burden of proof concerning the unreasonableness or unlawfulness of any through route, joint rate, minimum differentials between all rail rate and joint rate in connection with water service, or division of joint rates shall be upon the carrier or carriers making the complaint; and the commission shall give the hearing and decision of such questions preference over all other questions pending before it, except such questions as are given like preference by law, and decide the same as speedily as possible: PROVIDED, That if the Inland Waterways Corporation sells or leases its transportation facilities to any person, firm, or corporation to be operated as a common carrier, such person, firm, or corporation shall

[4] "the interstate commerce act, as amended" in 1928 act instead of "this title."

[5] "act" in 1928 act instead of "section."

be entitled to a certificate of public convenience and necessity upon making application therefor; and all through traffic arrangements and joint tariffs with rules, regulations, and practices in connection therewith published by the Inland Waterways Corporation and filed with the Interstate Commerce Commission and participated in by other carriers shall remain in full force and effect between such carriers and the person, firm, or corporation purchasing or leasing such transportation facilities from the Inland Waterways Corporation and operating the same as common carriers until changed by order of the commission, except that such through-traffic arrangements and joint tariffs, with rules, regulations, and practices therewith, may be changed by mutual consent of the water carrier and the other participating carriers. Joint rail and water rates as herein used shall be deemed to include every movement of traffic in which a water line can participate.

THE INTERSTATE COMMERCE ACT:

NATIONAL TRANSPORTATION POLICY [Added September 18, 1940.] [U. S. Code, title 49, notes preceedings secs. 1, 301, 901, and 1001.] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

SEC. 1. 49 U. S. C. (1) (a)

(1) That the provisions of this part shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment;

SECTION 1 (5) (a) 49 U. S. C. 1 (5) (a). All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

SEC. 3. (1) 49 U. S. C. 3 (1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

SEC. 13. (1) 49 U. S. C. 13 (1) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint

within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

SEC. 13. (2) 49 U. S. C. 13 (2) Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this part, or concerning which any question may arise under any of the provisions of this part, or relating to the enforcement of any of the provisions of this part. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this part, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant. Representatives of State commissions sitting with the Commission, under the provisions of this section, in cases pending before the Commission, shall receive such allowances for travel and subsistence expense as the Commission shall provide.

SEC. 14. 49 U. S. C. (1) That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

SEC. 15. (1) 15 U. S. C. 15 (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending com-

plaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part of the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

SEC. 307. (d) 49 U. S. C. 907(d) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail

rates and the joint rates in connection with such common carrier by water. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and common carriers by water. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of section 15.

SEC. 320 (e) Subsection (e) of section 3 of the Inland Waterways Corporation Act of June 7, 1924, as amended (U. S. C. title 49, sec. 153 (e)), is hereby repealed as of October 1, 1940; *Provided, however*, That (1) any certificate of public convenience and necessity granted to any carrier pursuant to the provisions of such subsection (e) shall continue in effect as though issued under the provisions of section 309 of the Interstate Commerce Act, as amended; and (2) through routes and joint rates, and rules, regulations, and practices relating thereto, put into effect pursuant to the provisions of such subsection (e) shall, after the repeal of such subsection (e), be held and considered to have been put into effect pursuant to the provisions of the Interstate Commerce Act, as amended.

APPENDIX NO. 2.

Quotations From Testimony Offered by the Texas Interests.

When Witness Holloman was on cross examination by Mr. E. H. Thornton, then General Manager of the New Orleans Joint Traffic Bureau, some questions were asked about the matter of injury to Galveston and Houston interests due to the differential rail-barge rates between New Orleans and the interior West. At page 9514 of the transcript, the following appears:

> Q. I am coming to this claim of injury that you have put up, which was aside from your proposal.
>
> A. Let me explain that a little bit further, since you have brought it up. We fellows who represent the communities and cities and ports cannot deal altogether with and put our thumb on some fellow that is hurt. We deal with the man who wants to establish a business in our community, a distributor who desires to go into the distribution business in our community, a manufacturer who wants to establish a manufacturing plant in our community, an importer who desires to import traffic; and the question of what the rate adjustment by one form or another of transportation, lots of times has the effect of deciding exactly where that man is going to put his industry, establish his business, or go into his importation or exportation business. That is what we are primarily interested in, he may go to New Orleans, and undoubtedly does go to New Orleans, in many instances because he finds a rate adjustment over there that extends him more preferences than he can get in the Texas ports. That is what we are interested in, in one form of the thing, and while I cannot put my finger on a definite movement of 150 pounds of bagging or ties or coffee or some other commodity, it does not mean that we are not hurt. That is the angle we have got to look at in our particular business.

When witness Holloman was on cross examination Mr. C. B. Bee, Special Counsel for the Oklahoma Corporation Commission, also asked him some questions about injury. Let us quote from pages 9530 and 9531 of the transcript:

> Q. All right. Let me ask you another question, Mr. Holloman. Assume a line of goods, such as coffee

that moves from foreign sources of origin, we will say Brazil, to New Orleans, and the same coffee does not move to the Texas ports, it is not available there and it is not purchasable there; now, we must assume from New Orleans to Oklahoma City a rail route to move that coffee—assume that my premise is correct, please—now, would you say that the barge line would not be permitted to make an equalized rate in connection the rail lines from New Orleans to Oklahoma City simply because such rate might disregard Houston where the commodity is not purchasable or obtainable?

A. Yes. For twenty years we have been trying to build up a coffee market in Houston. We have got one or two or three coffee accounts carried there, but we have never been able to get beyond that point by reason of the coffee market out of New Orleans. We have some large coffee roasters in Houston, and we would like to build a coffee market to supply them and the interior but we have never been able to do it because of the competition out of New Orleans, and some of that competition must be the rail rates—not the rail rates, but the transportation rates.

Q. And even though the merchant at Oklahoma City is unable to purchase the class or kind of coffee he wants at Houston and can purchase it at New Orleans, you still think that the barge lines should be prohibited from competing at a cost basis with the rail lines for that service?

A. If the merchant at Oklahoma City will support us, he will pretty soon have a coffee market in Houston, where he can buy all those stocks.

Q. That is your theory?

A. Yes, sir.

Mr. Bee: That is all.

When witness H. B. Cummins of the Houston Port and Traffic Bureau was on the stand he was asked some questions by Examiner Howell and Mr. Bee. We now quote from pages 9567 to 9570 of the transcript:

Examiner Howell: When you show the destinations on 1034, would you say they were actual points of shipment, of each of these commodities?

The Witness: Yes, sir.

Examiner Howell: Would you pick out what you might call principal consuming points?

The Witness: I picked out what I believed to be representative consuming points in this territory, Mr. Examiner. Denver is a destination for coffee; so is Hutchinson, Kansas, Oklahoma City, Shreveport, Wichita, and so on, and Ada, Coffeyville, Oklahoma City, and so on, are destinations for canned goods. As to news print paper, all of the destinations shown have newspapers of large daily circulation and are consuming points for newsprint paper.

Mr. Bee: Do you think Oklahoma City is a destination for sisal?

The Witness: I doubt that Oklahoma City would be, but McAlester would be, and the distance is approximately the same from Houston. The McAlester distance from New Orleans would be somewhat shorter than Oklahoma City.

Examiner Howell: Would you say the newspapers at these particular points named used principally import paper?

The Witness: Mr. Examiner, I could not say that they do use principally import paper, but I do know that large quantities of import paper, and some Swedish paper are imported through the Texas ports, and as well through New Orleans. What proportion of the consumption of newsprint paper at these interior points would be import and what proportion would be produced in the United States, I could not say.

Examiner Howell: Off the record.

(Discussion off the record.)

The Witness: Mr. Examiner, whether or not there has been a movement of any particular commodity by barge to any single destination or to any particular city I am not in position to say, but, representing the Port of Houston, I do want to make this statement, that almost daily we are in contact with distributors, exporters and importers of commodities who are looking for a port location through which to make their distribution to the best possible advantage. Now, considering the fact that New Orleans serves a large area on and east of the Mississippi River, and a consider-

able area west of the Mississippi River, notably in Wisconsin, Minnesota, Missouri, Iowa, Arkansas, and Louisiana, in which territory New Orleans either has rates equal to ours or generally lower than the rates from Houston, we find that on many commodities, such, for example, as coffee, the distribution will be determined by consumption as related to freight rates. For example, there are more coffee drinkers east of the Mississippi River and immediately west thereof than there are in Texas, Oklahoma, Kansas, Colorado, and New Mexico, because of the much denser population.

Considering the fact that New Orleans has a tremendous rate advantage as compared with Texas ports, in all the area on and east of the river and a large part of that west of the river, we have found that equalized rail rates, New Orleans with the Texas ports, in relation to traffic moving to the territory in Texas, Oklahoma, Kansas, Colorado, and New Mexico which we consider naturally tributary to the Texas Ports, determines in many cases where an exporter or importer will locate to do business.

Ordinarily, an exporter or importer does not have to have a considerable investment in storage facilities. They utilize the public storage facilities that are available at the port of destination. Recently we had a representative of a news print paper concern operating in Quebec, some four or five mills, and which concern is going to bring paper into the Gulf and distribute it throughout the Southwestern territory and portions of the Western Trunk Line territory, or they are going to try to—one cargo has already been put into Houston, 4,750 tons. We were successful in getting that particular cargo, even though, taking the Southwestern territory, Western Trunk Line territory, and the territory east, as a whole, New Orleans has an even break in most of the territory and lower rates in the remainder.

Now, if we have equalized railroad rates from New Orleans with the Texas ports, into Texas, Oklahoma, Kansas, Colorado and New Mexico and then superimposed upon that structure a differe ial for this barge-rail traffic, you can readily see that we are automat-

ically at a disadvantage with New Orleans to the extent of that differential.

There were many other questions put to these witnesses on cross-examination, but they generally dealt with rail-barge differentials for New Orleans assumed to be justified by facts, which is not the situation here.

Certificate of Service.

A copy of this brief was served on counsel for all parties of record by first-class mail on this 16th day of Octobe., 1950.

WM. A. DISQUE